Supreme Court, U.S.
FILED
JUL 26 2001
OFFICE OF THE CLERK

No. 00-1893

IN THE

# Supreme Court of the United States

JIMMIE L. MARTIN, d/b/a J & L SERVICES, *et al.*,

*Petitioners,*

*v.*

MARVIN V. STITES, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION

M. COURTNEY KOGER
SANDERS CONKRIGHT & WARREN, LLP
*Attorneys for Respondents*
10450 Holmes, Suite 330
Kansas City, MO 64131
(816) 942-6100

168279

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Are a county sheriff's decisions as to which tow operators his dispatcher will call for which non-preference tows in his county preempted as a "regulation or other provision having the force and effect of law," that relate to "price, route or services"?

## TABLE OF CONTENTS

*Page*

Question Presented ..... i

Table of Contents ..... ii

Table of Cited Authorities ..... iii

Statement of the Case ..... 1

Reasons for Denying the Writ ..... 5

I. Sheriff Stites' Policies Regarding Which Towing Companies Will Be Called For Which Tows By His Dispatcher Do Not Rise To The Level Of A Regulation Or Other Provision With The Force In Effect Of Law ..... 6

II. Even If The Policies Arise To The Status Of Regulations With The Force And Effect Of Law, Safety Is Not A Price, Route Or Service And Is Unaffected ..... 11

Conclusion ..... 14

## TABLE OF CITED AUTHORITIES

**Cases:** *Page*

*American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) ..... 7, 12

*Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) ... 9

*Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) ..... 12

*Mistretta v. United States*, 488 U.S. 361 (1989) ... 8, 9

*Morton v. Ruiz*, 415 U.S. 199 (1974) ..... 9

*People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870, 880 (Cal. Ct. App. 2001) ..... 13

*Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001) ..... 8, 13

*Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir.), *cert. denied*, 121 S. Ct. 1085 (2001) ..... 8, 13

*Cited Authorities*

*Page*

**Statutes:**

K.S.A. § 19-101a ..... 9

K.S.A. § 19-101a(b) ..... 10

49 U.S.C. § 14501(c) .....1, 8, 10, 14

49 U.S.C. § 14501(c)(1) ..... 1, 12

49 U.S.C. § 14501(c)(2) ..... 6

49 U.S.C. § 14501(c)(2)(A) ..... 1, 11

**Rule:**

United States Supreme Court Rule 14.1(f) ..... 5

**Other Authorities:**

49 C.F.R. 396.17-396.23 ..... 3

H.R. Conf. Rep. No. 103-677 at 85, reprinted in 1994 USCCAN at 1757 ..... 11

## STATEMENT OF THE CASE

Petitioners are tow truck operators in Linn County, Kansas, who sued Linn County Sheriff Marvin V. Stites and three members of the Linn County Board of Commissioners because they did not like Sheriff Stites' decisions determining which tow operators his dispatcher would call to tow vehicles whose owners were incapable of expressing a preference, or had no preference, for a particular tow operator ("non-preference tows"). Petitioners sought preliminary injunctive relief and partial summary judgment on their claim that Sheriff Stites' policies were preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), specifically by 49 U.S.C. § 14501(c).

The district court, the Honorable G.T. VanBebber, held an evidentiary hearing on the motion for preliminary injunction to allow petitioners to present evidence. The district court ruled in favor of respondents, holding that petitioners failed to put forth evidence that Sheriff Stites' policies amounted to regulation or other provision with the force of law that would be preempted by § 14501(c)(1). The district court subsequently granted partial summary judgment to respondents based upon the conclusion reached at the end of the evidentiary hearing. After the district court denied petitioners' motion to reconsider, that order was certified as a final order and appealed to the Tenth Circuit, which affirmed and then denied rehearing. Neither the district court nor the Tenth Circuit reached the issue of whether the policies were exempted from preemption by § 14501(c)(2)(A) as safety regulations, and petitioners have not presented that issue for review. Also not reached below was respondents' standing argument.

When Sheriff Stites first took office in January, 1995, his department relayed non-preference tows using a geographical division of the county, giving preference to the closest unit. Approximately 80% of tow referrals arise in the eastern side of the county, where petitioners Martin and Hanes but not the Morse petitioners were located.[1] The Morse petitioners complained repeatedly to Sheriff Stites about this system and related matters, such as other companies storing towed vehicles in improperly zoned areas. Sheriff Stites asked all tow truck operators then in operation in the county to meet and agree upon some system for the dispatcher to make non-preference tow calls. The operators were not able to agree, so Sheriff Stites adopted a proposal put forward by petitioner John Morse involving a geographical division of the county. However, the Morses continued to complain about the geographical division and other matters.

Therefore, in December, 1997, Sheriff Stites implemented a pure rotational system for non-preference tow referrals. Under this rotational policy, the dispatchers called tow operators on a rotational basis regardless of geographic location. Sheriff Stites testified that he implemented this rotational policy, that it was his policy, that he did not recall even discussing that policy with the county commissioners prior to adopting it, and that he took full responsibility for it.

Also, in December, 1997, the commissioners held a meeting that included an executive session. The commissioners

---

1. Linn County is on the Kansas-Missouri border approximately 60 miles south of the metropolitan Kansas City area. The principal highway running through the county, 69 Highway, is on the eastern side, close to the Missouri border.

discussed county-initiated tows and the county's potential liability at that meeting. After the executive session — during which, as Commissioner Read acknowledged, Kansas law prohibits commissioners from taking any action — the county counselor "reported" that the county would engage in a sixty (60) day moratorium for towing county requested vehicles and would then use only tow operators who filled out a not-yet-designed application. The county counselor, Sheriff Stites and the county clerk were to design the application, which thus did not exist on the date petitioners claim it was adopted.

The county subsequently did design a form entitled "application for permit for towing services for Linn County." The form sought information about the tow trucks or vehicles in use, asked whether the operator had current Kansas Corporation Commission ("KCC") authority, requested a copy of the vehicle inspection report complying with 49 C.F.R. 396.17-396.23, and asked whether the operator had a legal, properly zoned area for storage of vehicles. Petitioners have never disputed that they needed KCC authority, had to comply with 49 C.F.R. 396.17-396.23 or had to store towed vehicles in a legal, properly zoned area; their dispute is in having to show that they complied before receiving non-preference calls through the dispatcher.

Although the form was designated an application for a permit, what was at issue was whether or not the tow truck operator would be placed upon the dispatcher's list for non-preference and county tow calls. The form had nothing to do with whether a tow operator could tow vehicles in Linn County. Furthermore, an out-of-county tow service did not

need a permit for any reason.[2] Thus, tow operators who did not fill out a form could continue to tow in the county without any penalty but would not receive calls from the Sheriff's department unless the consumer requested their service.[3] Petitioners all filled out forms and all were placed on the dispatcher's call list until petitioner Martin asked Sheriff Stites to remove his vehicles.

Sheriff Stites abandoned the pure rotation policy that he had implemented in December, 1997 after approximately two months. He did not believe that the pure rotation system worked properly and identified two instances in which problems had occurred. In both cases, a sheriff's deputy was delayed at the scene, waiting for a tow unit from the far side of the county. In one instance, the delay resulted in a citizen complaint about the department's slow response time because

2. The Morse petitioners also sought to affiliate with an out-of-county company that had a large wrecker, i.e., one that could tow eighteen-wheelers. An out-of-county operator did not need to fill out the permit form. Petitioners claim that only defendant Schoenhals (a towing operator not involved in this appeal) was allowed to provide large wrecker services. This argument is false. First, defendant Schoenhals had sold his large wrecker for lack of business prior to the hearing. Second, Sheriff Stites testified that he could not recall a single non-preference tow call for a large wrecker because most truckers had service contracts with tow companies.

3. Sheriff Stites did, at one point, instruct his dispatcher not to call petitioner Haynes because Haynes had only a "repo" truck that could only be used if the vehicle to be towed was on the road and had all four tires inflated. Petitioners never linked this refusal to call a single operator with equipment known to be inadequate to the commissioners or any county action or policy in any fashion. Haynes had previously been on the list but was taken off it when petitioner Martin, who owned the trucks he and Haynes were using, asked Sheriff Stites to remove his trucks.

the deputy waiting for the Morse tow truck was one of only two on duty at the time. Sheriff Stites was concerned about possible delays and that they might effect public safety, although he never undertook any scientific study of the matter. He changed back to the geographic division policy because he felt it was safer, that it would improve response times, and to some degree it was based on economics by calling the closest wrecker since towing companies frequently charged a per mile fee. Both Sheriff Stites and Commissioner Reid testified that the geographic division policy was the Sheriff's.

Petitioners have acknowledged that Sheriff Stites needs some system under which his dispatcher can call a particular tow operator to perform non-preference or county tows. Petitioners want a pure rotation policy rather than the geographic division that Sheriff Stites decided to use, but they have never explained how their desired policy would not be preempted if Sheriff Stites' geographic division system is.

## REASONS FOR DENYING THE WRIT

The petition should not be granted, because petitioners never made even the minimal threshold showing below that the Sheriff's challenged policies constitute a regulation or other provision having the force in effect of law so that the statutory preemption would apply. Petitioners concede that the Sheriff's policies are not regulations by not setting them out as required by Supreme Court Rule 14.1(f). Petitioners conceded below that Sheriff Stites is entitled to establish a policy or system — although they would prefer a different policy — for determining which towing company will receive which calls from the Sheriff's dispatcher.

This case is not about private towing contracts between any towing company and any motor vehicle owner, or about towing calls where the owner of the vehicle to be towed expresses a preference for a particular towing company. The challenged policies relate only to which towing company will receive which calls from the Sheriff's office to perform towing work when the owner of the vehicle to be towed is not present, is incapacitated, or has no preference.[4] The policies have nothing to do with whether petitioners or any other towing company, whether based in Linn County or not, can perform tows in Linn County.

## I. SHERIFF STITES' POLICIES REGARDING WHICH TOWING COMPANIES WILL BE CALLED FOR WHICH TOWS BY HIS DISPATCHER DO NOT RISE TO THE LEVEL OF A REGULATION OR OTHER PROVISION WITH THE FORCE AND EFFECT OF LAW

The ground upon which the district court made its determination, and the issue specifically addressed by the Tenth Circuit Court of Appeals, relate to whether Sheriff Stites' policies are provisions that had the force and effect of law. Both courts correctly found that they were not. Petitioners have conceded that the policies are not regulations in their petition.

---

4. Non-preference tows can be either consensual, if the vehicle's owner is present and coherent but simply has no preference for a particular tow operator, or non-consensual. Examples of non-consensual tows include accidents resulting in the death or serious injury of the vehicle's owner, abandoned vehicles or stolen vehicles recovered by the Sheriff's deputies. Section 14501(c)(2) specifically allows local regulation of rates for nonconsensual tows.

The question, therefore, is what constitutes a provision with the force and effect of law. In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), the Court construed similar preemption language from the Airline Deregulation Act that prohibits a state from enacting or enforcing any regulation "or other provision having the force and effect of law" relating to rates, routes or services of any air carrier. *See Wolens*, 513 U.S. at 222-23. The Court held that "the word series 'law, . . . regulation . . . or other provision' . . . 'connotes official, government-imposed policies' " while "the phrase 'having the force and effect of law' is most naturally read to refe[r] to binding standards of conduct.' " *Id.* at 229 n.5.

At issue in *Wolens* was whether plaintiffs could sue an airline under a state's consumer protection statute, specifically Illinois' Consumer Fraud Act. The Court described that act as "prescriptive" because "it controls the primary conduct of those falling within its governance." *Id.* at 227. The Court held that the statute served "as a means to guide and police the marketing practices of the airlines" so that plaintiffs' claims under the act were preempted. *See id.* at 228.

Petitioners failed to present any evidence to suggest that either the geographic division policy or what the Tenth Circuit designated the "permit policy" had the force and effect of law because they constituted a guideline or binding standard. Sheriff Stites could change that geographic division policy at any time, just as he did in December, 1997 and February, 1998. The permit form is a mere formality that requires no more from any tow operator than was previously required by unchallenged law. No tow operator is required to obtain a permit in order to do business in the county, unlike the license

requirement found preempted in *Petrey v. City of Toledo*, 246 F.3d 548, 552 (6th Cir. 2001) (employee cited for towing without a license) and *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1043-44 (9th Cir.), *cert. denied*, 121 S. Ct. 1085 (2001) (tow operator and employees threatened with legal action for failing to comply with city ordinances). Here, nothing would happen to tow operators who towed vehicles on the other side of the county or without filling out a permit form. Furthermore, nothing would happen to Sheriff Stites or his dispatcher if a call was made to a tow operator on the wrong side of the county or that had not filled out a form.

Furthermore, § 14501(c) does not preempt a local political jurisdiction's ability to determine which tow operator it will hire or call. In *Petrey*, the Sixth Circuit held that the City of Toledo could set standards and choose towers best able to perform for nonconsensual, i.e., police tows. *See Petrey*, 246 F.3d at 555. In *Tocher*, the Ninth Circuit held that the Santa Ana Chief of Police could establish rules and regulations governing tow operators that would be placed on a rotational tow list and called by the police. *See Tocher*, 219 F.3d at 1049. Surely § 14501(c) does not require Sheriff Stites to call tow operators who do not have adequate and safe equipment for tows any more than it prohibited the City of Toledo and the City of Santa Ana from exercising their discretion in picking the tow companies that they would call for their towing needs.

This Court has also had occasion to address when a rule, standard or regulation has the force and effect of law outside the preemption context. *See Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). Guidelines "have the force and effect of laws," where "a judge who

disregards them will be reversed" and where they are "significant, legally binding prescriptions governing application of governmental power against private individuals." *Id.* A decision to call tow operators on the east side of the county with vehicles that had passed a federally required inspection for tows on the east side of the county hardly amounts to "legally binding prescriptions."

In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) the Court addressed directly whether a regulation would have the force and effect of law and how a regulation would not have that effect unless it had both certain substantive characteristics and was the product of certain procedural requisites. *See id.* at 301. Substantive rules differ from interpretive rules and are rules that effect individual rights and obligations. This characteristic, the Court held, "is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.' " *Id.* at 302 (*quoting Morton v. Ruiz*, 415 U.S. 199 (1974)). Furthermore, not only must a regulation be substantive, but it also ***must have been promulgated in conformity with statutory procedural requirements***. *See id.* at 303. Here, the policies were not adopted in accordance with any of the required procedural elements under Kansas law. Instead, the Sheriff's policies are more analogous to interpretive rules that are "issued by an agency to advise the public of the agency's construction of the statues and rules which it administers" that do not have the force and effect of law. *See Chrysler*, 441 U.S. at 302 n.31.

Petitioners presented no evidence that Linn County attempted to comply with K.S.A. § 19-101a, which is the statute setting forth the procedure for a county exercising its home rule powers. That statute requires a county to pass a

resolution through its Board of County Commissioners and then to publish that resolution in the official county newspaper. *See* K.S.A. § 19-101a(b). Petitioners presented no evidence of any resolution being passed. Instead, the record showed that the County Commission "informed" petitioner John Morse that it hoped to have an answer to his question "concerning legal towing and storage in the county" within sixty days, and that in February, the County Commission "reported" that towing services would be split geographically for county tows and non-preference tows. Petitioners presented no evidence whatsoever of any vote, any resolution, or any report being published in the county newspaper.

Petitioners instead attempt to raise the spectre of uncontrolled regulation of tow operators by cities and counties, contrary to Congress' intent, because they claim governments will be able to pass ordinances without validly enacting them. That simply is not the case here. Sheriff Stites was not creating a prescriptive policy that controlled tow operators' conduct, or ticketing them for operating on the opposite side of the county or without having filled out a form. Nothing in § 14501(c) says that Sheriff Stites has to dispatch a tow truck that he knows cannot handle the job.[5] The fact that Sheriff Stites chose a geographic division of the county — instead of always calling the closest operator, or assigning days for each willing operator to take calls — is not a law subject to preemption. Furthermore, the fact that Sheriff Stites chose to have his dispatcher call operators that he knew were complying with valid laws is not itself a law

5. In fact, petitioners apparently agree that Sheriff Stites can call tow operators with appropriate equipment, since they sought to obtain access to a large wrecker by affiliating with another operator so that they could receive large truck calls, if any ever arose.

or regulation. Petitioners' argument to the contrary would lead to the ridiculous result that a sheriff could not only not stop a tow truck driver for driving drunk, or without headlights, or with obviously defective and dangerous equipment (because a decision to enforce such a valid law would be preempted), but would even have to call that operator for someone whose only error was in not knowing the name of a towing company nearby or being able to say it after an accident. Neither policy has the force and effect of law, and the writ should be denied.

## II. EVEN IF THE POLICIES ARISE TO THE STATUS OF REGULATIONS WITH THE FORCE AND EFFECT OF LAW, SAFETY IS NOT A PRICE, ROUTE OR SERVICE AND IS UNAFFECTED

Furthermore, to the extent the policies relate to safety or financial fitness/insurance issues, they are not preempted even if they do rise to the level of a regulation or provision having the force in effect of law. Congress never intended for preemption of "price, route or service" regulation to extend to regulation concerning safety or financial fitness. According to the House Conference Report, Congress' intent and belief was "that state authority to regulate ***safety, financial fitness and insurance*** . . . of motor carriers is unchanged since state regulation in those areas ***is not a price, route or service and thus is unaffected***." H.R. Conf. Rep. No. 103-677 at 85, reprinted in 1994 USCCAN at 1757 (emphasis added).[6]

6. In fact, 49 U.S.C. § 14501(c)(2)(A) specifically exempts safety and financial fitness regulations from preemption. Neither the district court not the Tenth Circuit reached the issue of whether that exemption protected Sheriff Stites' policies because both courts found that the policies did not rise to the level of law that would trigger preemption at all.

Obviously, the Court addresses a preemption question by analyzing the statute's text and assuming that historic police powers of the states are not to be superceded unless that was the clear and manifest purpose of Congress. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). In other words, the "ultimate touchstone" of preemption analysis is congressional intent, and understanding the scope of preemption rests primarily upon an understanding of congressional purpose. *Id.* at 485. Thus, regardless of how broadly the Court interprets the "relating to" language in § 14501(c)(1), Congress' purpose not to preempt regulations concerning safety because they were not regulations of price, route or service requires a finding that Sheriff Stites' safety concerns survive preemption.

Sheriff Stites testified about those safety issues. He chose to go from a rotational distribution system back to a geographic division system in part because of his safety concerns, which arose out of two incidents in two months in which a deputy was tied up at the scene of an accident waiting for a cross-county tow operator to arrive. Furthermore, the fact that Sheriff Stites does not place a tow operator on his dispatcher's call list until he has received information establishing the tow operator has a valid KCC authority and has passed a mandatory federal inspection also reflects safety concerns.

The Court adopts the level of preemption best calculated to carry out congressional design. *See Wolens*, 513 U.S. at 234. There, the Court rejected interpretations of its prior decisions that would have resulted in either minimal preemption or total preemption and chose instead a "middle course . . . best calculated to carry out the congressional design." *Id.* Sheriff Stites should not be required to call tow

operators with inadequate equipment or facilities and slow response times, or with operators "prone to damaging the cars they transport" any more than the City of Toledo was. *See Petrey*, 246 F.3d at 558. Congress' desire to protect towing companies from having to "adher[e] to a multitude of different regulatory schemes in every locality where [they] conducted business" is in no way thwarted if Sheriff Stites has his dispatcher call tow trucks from the eastern part of the county for tows in the eastern part of the county and tow trucks from the western part of the county for tows in the western part of the county. *Tocher*, 219 F.3d at 1048. *See also People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870, 880 (Cal. Ct. App. 2001) ("Congress's deregulatory purpose was focused on disparate *economic* regulation") (emphasis in original.

Congressional intent — the ultimate touchstone of preemption analysis — to preempt conflicting economic regulatory schemes simply does not extend to a county sheriff's policies as to which tow operators will receive which non-preference tow calls through his department. The writ should be denied.

## CONCLUSION

The Court should deny the writ because Sheriff Stites' policies concerning which tow operators his dispatcher calls for which non-preference tows in his county are neither provisions with the "force and effect of law" nor, as safety concerns, related to "price, route or services," and thus are not preempted under 49 U.S.C. § 14501(c), and both the district court and the Tenth Circuit reached the correct result below.

Respectfully submitted,

M. COURTNEY KOGER
SANDERS CONKRIGHT & WARREN, LLP
*Attorneys for Respondents*
10450 Holmes, Suite 330
Kansas City, MO 64131
(816) 942-6100